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No. 91-2022

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

IN RE WASHINGTON PUBLIC POWER SUPPLY SYSTEM SECURITIES LITIGATION MDL-551

ILLINOIS EMPLOYERS INSURANCE OF WAUSAU,
Petitioner,

VS.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

In its opposing brief, respondent Public Utility District No. 2 of Grant County ignores the basis of this petition. The petition presents a significant question of first impression as to whether, during the pendency of an admittedly appealable remand order, the remand order must be stayed. The answer to this question is critical to the ability of the federal courts to maintain their own diversity jurisdiction.

Respondent ignores the pertinent grounds for granting *certiorari*, and has incorrectly characterized the questions presented by this petition. Respondent's attempts to convert the petition into a request by petitioner Illinois Employers Insurance of Wausau ("Wausau") for review of the remand order itself or for

review of the merits of the underlying lawsuit must fail. This Court should grant *certiorari* to preserve the vitality of federal jurisdiction and to ensure that the federal courts are not divested of their jurisdiction while hearing an appeal.

REVIEW OF THIS MATTER IS NOT PREMATURE BECAUSE THE NINTH CIRCUIT DISSOLUTION ORDER IS FINAL

Respondent argues that Supreme Court Rule 11 precludes review of this question prior to the Ninth Circuit's decision on Wausau's appeal on the merits of the District Court's March 12, 1992 order (the "Remand Order," attached as Appendix C to the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit ("Petition")).[1] Respondent's unfounded argument ignores the fact that petitioner is not here seeking review of the merits of the appeal of the Remand Order presently pending before the Ninth Circuit. Rather, petitioner seeks review of a Ninth Circuit order entered May 29, 1992 (the "Dissolution Order," attached as Appendix A to the Petition), which concerns the narrow issue of whether the Remand Order should be stayed pending appeal.[2] Thus, the issue presented is not premature; respondent's invocation of Supreme Court Rule 11 is necessarily misplaced.

THE PETITION PRESENTS AN IMPORTANT UNRESOLVED FEDERAL JURISDICTIONAL QUESTION

In trying to minimize the importance of the Petition, respondent wholly ignores the possible effects on petitioner of the

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[1] Petitioner respectively refers the Court to the Petition, filed June 17, 1992, which contains the pertinent judicial orders at issue. The Petition also contains a recitation of petitioner's corporate affiliations. No amendments to that recitation are necessary.

[2] Reconsideration of that order was denied on June 5, 1992 (attached as Appendix B to the Petition) and is now final. The Dissolution Order, as acknowledged in the order itself, does not address the merits of petitioner's appeal.

implementation of the Remand Order. As Wausau set forth in the Petition, the Ninth Circuit has held that the implementation of an order of remand apparently divests the federal court system of the power to retrieve or otherwise influence the proceedings upon the return of the file to the state court. *Seedman v. U.S. Dist. Court,* 837 F.2d 413 (9th Cir. 1988). However, the Ninth Circuit's actions in this matter are inconsistent with that pronouncement.

In this matter, the District Court remanded the case to the Grant County, Washington, Superior Court on June 12, 1992. Thus, while petitioner's express right to appeal the Remand Order (*See, Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 345 (1976); *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.,* 940 F.2d 550, 553 (9th Cir. 1991); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.,* 741 F.2d 273, 276 (9th Cir. 1984); *Regis Associates v. Rank Hotels (Management) Ltd.,* 894 F.2d 193 (6th Cir. 1990)) technically remains, this right is of little value if the remand cannot be voided. Thus, the Dissolution Order must be reversed. For the same reasons, as a practical matter, petitioner's right to federal jurisdiction grounded upon removal (*See,* 28 U.S.C. § 1441, et seq.) is similarly jeopardized if the Dissolution Order is allowed to stand. Review here is necessary and proper.

RESPONDENT'S OPPOSITION ADMITTEDLY FAILS TO ADDRESS THE JURISDICTIONAL ANOMALY

Respondent admits that, "[a]lthough we do not address the merits of Wausau's position on the jurisdictional issue, we do note that even if it is correct, review of the remand order is possibly available through Supreme Court review of a subsequent judgment in the case." Respondent's Brief in Opp., p. 7. On the contrary, review of the Dissolution Order is required now, not at the conclusion of the Ninth Circuit's review of the merits of the Remand Order, in order to clarify the jurisdictional anomaly created by the Ninth Circuit.

Respondent, moreover, misconstrues petitioner's arguments. First, respondent purports to restate petitioner's position as follows: "Wausau's position is that the Ninth Circuit's denial of a

stay in this case has effectively precluded review of any remand order in any case where a remand is based on a non-jurisdictional factor." Respondent's Brief in Opp., p. 4. This is not so. The Petition is expressly concerned only with a collaterally appealable Remand Order based on the interpretation of a forum selection clause. The Dissolution Order has the practical effect of denying petitioner this right to appeal.

Second, contrary to respondent's assertions, the Petition does not address, nor does it dispute, the validity of the factors applied in assessing the grant of a stay pending appeal per *Hilton v. Braunskill*, 481 U.S. 770 (1987). The Petition deals specifically with the Dissolution Order as it relates to petitioner's right to federal removal jurisdiction (*See*, 28 U.S.C. § 1441, et seq.) and its right to appeal the Remand Order, as authorized by numerous Ninth Circuit decisions. *See, Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., supra*, 940 F.2d 550 (9th Cir. 1991); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., supra*, 741 F.2d 273 (9th Cir. 1984); *Regis Associates v. Rank Hotels (Management) Ltd., supra*, 894 F.2d 193 (6th Cir. 1990).

Third, respondent's assertion that the return of the case to the Grant County Superior Court on June 12, 1992 moots the Petition (Respondent's Brief in Opp., p. 2) is incorrect and ignores the importance to petitioner of its pending appeal of the Remand Order. In short, if the Dissolution Order is not reconsidered and reversed, a decision favorable to petitioner on the merits of the appeal of the Remand Order itself may be mooted because, under *Seedman*, the Ninth Circuit may be powerless to effectuate a removal of the case from the state court back to the District Court. Thus, the real issue presented in the Petition is not, as respondent suggests, whether the Ninth Circuit properly applied the standards of *Hilton v. Braunskill, supra*, 481 U.S. 770 (1987), in dissolving the District Court's April 15, 1992 stay order. Rather, the issue is whether, as a practical matter, petitioner's statutorily granted right to exercise federal removal jurisdiction and its right to appeal the remand at issue will be allowed to fall through jurisdictional "cracks" created by incongruous Ninth Circuit decisions. (*Compare, Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., supra*, 940 F.2d 550 (9th Cir. 1991) and

Seedman v. U.S. Dist. Ct., supra, 837 F.2d 413 (9th Cir. 1988).) This question should be addressed now to seal these cracks and eliminate this jurisdictional vacuum.

Finally, petitioner seeks no relief concerning the merits of the underlying insurance coverage dispute. To therefore suggest, as does respondent, that "this is just a simple insurance coverage dispute" (Respondent's Brief in Opp., p. 3) overlooks the importance and the nuances of petitioner's jurisdictional argument.

CONCLUSION

The continued vitality of federal jurisdiction being at issue, a writ of *certiorari* should be issued to review the order of the Court of Appeals for the Ninth Circuit dissolving the stay of the District Court's Remand Order pending appeal. Respondent's request for attorneys' fees and double costs is inappropriate and should be rejected.

Respectfully submitted,

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